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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES A. HAYES,)	
)	
Appellant-Petitioner,)	
)	
vs.)	No. 26A01-0707-PC-325
)	
STATE OF INDIANA,)	
)	
Appellee-Respondent.)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jeffrey F. Meade, Judge
Cause No. 26C01-0307-PC-3

December 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Hayes appeals the post-conviction court's denial of his petition for post-conviction relief ("PCR petition") challenging his conviction for murder and possession of a sawed-off shotgun. Reversed in part and affirmed in part.

Issue

Hayes raises one issue, which we restate as whether he received ineffective assistance of trial and appellate counsel.

Facts

Hayes fatally shot John Gulley, his wife's ex-husband, in the face at close range during a confrontation on the town square in Princeton on July 29, 1990. The State charged Hayes with murder and Class D felony possession of a sawed-off shotgun. The jury received an instruction at trial regarding the lesser-included offense of voluntary manslaughter incorrectly listing sudden heat as an element of voluntary manslaughter that the State had to prove. The instruction did not inform the jury that the State had the burden to prove the absence of sudden heat to support a murder conviction. Trial counsel did not object to the instruction. On October 25, 1990, Hayes was convicted of murder and possession of a sawed-off shotgun. The trial court sentenced Hayes to forty-five years for murder and two years for possession of the sawed-off shotgun, to be served consecutively.

Hayes's trial counsel acted as his appellate counsel and filed a direct appeal on March 21, 1991, contending that autopsy photographs of the victim were improperly admitted. On May 22, 1991, this court affirmed his convictions. Hayes filed a pro se

PCR petition on July 31, 2003, and moved to amend the PCR petition in 2006. The post-conviction court held a hearing on February 12, 2007. On June 6, 2007, the post-conviction court issued findings of fact and conclusions of law and denied the PCR petition. This appeal followed.

Analysis

A PCR petitioner must establish grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); Ivy v. State, 861 N.E.2d 1242, 1244 (Ind. Ct. App. 2007), trans. denied. When a post-conviction court denies relief, the petitioner appeals from a negative judgment and must demonstrate on appeal that the evidence unerringly and unmistakably leads to a conclusion opposite that reached by the court. Ivy, 861 N.E.2d at 1244. We may reverse the post-conviction court's decision only if the evidence is without conflict and leads to a conclusion opposite that reached by the court. Id.

A claim of ineffective assistance of counsel requires the defendant to show by a preponderance of the evidence that (1) counsel's performance was below the objective standard of reasonableness based on prevailing professional norms and (2) the defendant was prejudiced by counsel's substandard performance, i.e. there is a reasonable probability that, but for counsel's errors or omissions, the outcome of the trial would have been different. Stephenson v. State, 864 N.E.2d 1022, 1031 (Ind. 2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Counsel's performance is presumed effective. Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors

and bad tactics do not necessarily mean that representation was ineffective.” Grinstead v. State, 845 N.E.2d 1027, 1036 (Ind. 2006).

Hayes argues trial counsel should have objected to the improper instruction regarding involuntary manslaughter. The instructions at issue provided:

Instruction No. 11

The crime of murder is defined by statute as follows:

A person who knowingly or intentionally kills another human being, commits murder, a felony.

To convict the defendant, the State must have proved each of the following elements:

The defendant

1. knowingly or intentionally
2. killed
3. another human being, to wit: John M. Gulley.

If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty.

If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty of murder, a felony.

* * * * *

Instruction No. 14

The crime of voluntary manslaughter is defined by statute as follows:

A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony.

The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder to voluntary manslaughter.

To convict the defendant the State must have proved each of the following elements:

The defendant

1. knowingly or intentionally
2. killed
3. another human being, to wit, John M. Gulley,
4. while acting under sudden heat

If the State failed to prove each of these elements beyond a reasonable doubt, and you further find the defendant did the killing while acting under sudden heat, you should find the defendant guilty of voluntary manslaughter, a Class B felony.

Tr. pp. 66-67.

Instruction 14 incorrectly lists sudden heat as an element of voluntary manslaughter that must be proven by the State. Instruction 11 does not inform the jury that the absence of sudden heat is an element of murder upon which the State bears the burden of proof. The State concedes that these instructions are incorrect.

Prior to Hayes's conviction, this court found that failing to object to such an error in the instruction constituted ineffective assistance of counsel. Palmer v. State, 553 N.E.2d 1256, 1259 (Ind. Ct. App. 1990), vacated, 563 N.E.2d 601 (Ind. 1990), rev'd on rehearing, 573 N.E.2d 880 (Ind. 1991). Palmer I had been decided by this court on May 17, 1990, four months before Hayes's trial. In that case, the jury was instructed that the State had the burden to prove the absence of malice and the presence of sudden heat in order to convict the defendant of voluntary manslaughter. That opinion was vacated on

December 13, 1990 by the first decision of our supreme court. See Palmer v. State, 563 N.E.2d 601 (Ind. 1990), rev'd on rehearing, 573 N.E.2d 880 (Ind. 1991). On rehearing in 1991, our supreme court held that counsel's failure to object to and appeal the instruction "rendered their assistance ineffective," agreeing with our decision. Palmer, 573 N.E.2d 880 (Ind. 1991).

Because our supreme court has stated that failure to object to this type of instruction constitutes ineffective assistance, we have no choice but to reverse the denial of post-conviction relief.¹ Although the State argues that no evidence of sudden heat existed, the trial court in Hayes's case determined that the facts warranted a sudden heat instruction. The post-conviction court stated, "sudden heat was not raised by either argument or evidence." App. p. 117. However, "any appreciable evidence of sudden heat justifies an instruction on voluntary manslaughter." Underwood v. State, 535 N.E.2d 118, 120 (Ind. 1989) (citations omitted). Here, Hayes's statement to police was entered into evidence. In that statement, Hayes tells investigating officers that he "freaked out," that "something possessed me to do that," that he was angry, and that he had "anger built up." Tr. pp. 798, 799, 801, 815. These statements convey that Hayes

¹ The State contends that any impropriety in the instruction does not constitute fundamental error because the trial court also instructed the jury that sudden heat is a mitigating factor. Later cases found that an instruction that explains sudden heat as a mitigating factor obviates the need for reversal even when sudden heat had been incorrectly listed as an element to be proven by the state. See Bane v. State, 587 N.E.2d 97, 100 (Ind. 1992) (finding that though the instruction improperly suggested sudden heat was an element that had to be proven by the state it was did not deprive defendant of his due process rights and was therefore not fundamental error); Isom v. State, 651 N.E.2d 1151, 1153 (Ind. 1995) (finding that an erroneous instruction did not mislead the jury when the jury was instructed that sudden heat acts as a mitigator for reducing murder to voluntary manslaughter). The nature of the error does not change the explicit holding of Palmer that the failure to object constituted ineffective assistance. To hold otherwise would, in our view, contravene supreme court precedent.

could have been acting in a sudden heat, or at least that fact might have served to mitigate the crime of murder.

The jury was not properly instructed regarding the State's burdens as they related to sudden heat. Failure to object to the incorrect instructions constituted ineffective assistance of counsel and warrants a reversal of the post-conviction court.²

Conclusion

Hayes's counsel at trial provided ineffective assistance by not objecting to the incorrect instructions. We reverse the finding of the post conviction court regarding Hayes's murder conviction. This holding does not affect his conviction for possession of a sawed of shotgun.

Reversed in part and affirmed in part.

SHARPNACK, J., and VAIDIK, J., concur.

² The post-conviction court did not make any findings regarding laches.